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Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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In the Matter of )  
 )  
1998 Biennial Regulatory Review -- )  
Spectrum Aggregation Limits )  
for Wireless Telecommunications Carriers )  
\_\_\_\_\_)

WT Docket No. 98-205

**REPLY COMMENTS OF D&E COMMUNICATIONS, INC.**

D&E Communications, Inc. ("D&E"), by its attorneys, hereby submits its reply comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1</sup> The initial comments submitted in this proceeding demonstrate that the wireless marketplace in all but the largest urban areas is not yet truly competitive, and the CMRS spectrum cap is still necessary to advance the goals espoused by the Commission in establishing and maintaining the cap. D&E believes that repealing the CMRS spectrum cap would be premature and counterproductive in most geographic areas at this time.<sup>2</sup>

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<sup>1</sup>Notice of Proposed Rulemaking (1998 Biennial Regulatory Review -- Spectrum Aggregation Limits for Wireless Telecommunications Carriers (WT Docket No. 98-205); Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap; Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap (WT Docket No. 96-59); Implementation of Sections 3(n) and 332 of the Communications Act (GN Docket No. 93-252); and Regulatory Treatment of Mobile Services), FCC 98-308 (released Dec. 10, 1998)) (the "NPRM").

<sup>2</sup>D&E believes that sufficient competition exists to allow modification of the spectrum cap in the largest urban markets, defined as the top 50 Basic Trading Areas ("BTAs") ranked by population. Because Major Trading Areas ("MTAs") may encompass rural areas as well as urban centers, the largest urban BTAs would seem to be a more appropriate cut-off mechanism.

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The comments were evenly split as to whether to 1) retain the CMRS spectrum cap or 2) repeal, significantly relax, or forbear from enforcing the cap. This split essentially reveals a difference of opinion as to how far competition in the mobile voice services market has advanced. In D&E's comments, it provided evidence of the actual level of competition in the markets in central Pennsylvania in which it operates. It showed that in the Harrisburg, Lancaster, Reading and York-Hanover BTAs, the wireless telecommunications markets are still highly concentrated and without meaningful competition. These markets continue to be dominated by the two cellular incumbents, and the new entrants that are operational are merely fledgling competitors. In these markets, the actual state of competition for mobile voice services systems today closely resembles the state of competition when the CMRS spectrum cap rules were initially adopted in 1994 and when the Commission revisited the cap in 1996. The rationale extolled by the Commission in adopting and retaining the spectrum cap likewise remains valid in these markets.

AT&T's recently announced acquisition of Vanguard Cellular ("Vanguard") presents an excellent example of the potential damage wrought to competition in central Pennsylvania if the spectrum cap is repealed. The merger would create a significant overlap in violation of the spectrum cap as a result of AT&T ownership of 30 MHz of PCS spectrum in the Philadelphia MTA and Vanguard's ownership of 25 MHz of cellular spectrum in numerous Pennsylvania MSAs and RSAs. According to D&E's calculations, if the spectrum cap were repealed or significantly modified, AT&T/Vanguard would own 55 MHz of spectrum in an area with a population overlap of approximately 27 percent.<sup>3</sup> AT&T's Philadelphia MTA overlaps with all of Vanguard's Harrisburg,

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<sup>3</sup>The population of the Philadelphia MTA is 8,927,748. The population within Vanguard's cellular MSAs and RSAs which are overlapped by the Philadelphia MTA is 2,414,444. Thus the  
(continued...)

PA MSA, Lancaster, PA MSA, Reading, PA MSA, State College, PA MSA, Williamsport, PA MSA, York, PA MSA, and Lebanon, PA RSA #12, and virtually all of its Union, PA RSA #8 and Huntington, PA RSA #11.

The acquisition would give AT&T an immediate foothold in these markets. AT&T's market dominance and financial clout will certainly have a negative impact on other carriers in these markets, and allowing AT&T to assume Vanguard's established customer base thwarts the development of new entrants. AT&T must not be allowed to use its size and tremendous financial resources to amass enormous amounts of spectrum and penetrate the central Pennsylvania markets before meaningful competition has developed there. New entrants must be given more than a year or two to establish a market presence prior to elimination of the competitive safeguards of the spectrum cap. Otherwise sustainable, rivalrous competition will never occur.

If the Commission is to be true to its goals in making PCS spectrum available -- to foster competition in what had been a duopolistic mobile voice services market -- it must not prematurely eliminate the spectrum cap in markets which are not truly competitive. In all but the largest urban markets, the spectrum cap still serves the purposes for which it was adopted and retained: 1) to promote competition and prevent anti-competitive horizontal concentration; 2) to prevent incumbent licensees from gaining too great a competitive advantage over new entrants; and 3) to avoid excessive concentration of licenses and to widely disseminate licenses. Of course, the Commission has not guaranteed the success of new PCS entrants in the wireless marketplace, but stripping away the major

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<sup>3</sup>(...continued)

population of the PCS licensed area which is within the CGSAs is approximately 27 percent -- far exceeding the 10 percent significant overlap threshold set forth in 47 C.F.R. § 20.6(c). Note that these figures represent the 1990 census full-market population, while the actual population within the CGSA of Vanguard's overlapped cellular markets may be somewhat lower.

safeguard designed to counterbalance the overwhelming headstart of the incumbents even before many potential new entrants receive licenses or become operational -- much less emerge as viable competitors -- is surely dooming these new PCS entrants to failure.

Given the important policy goals served by the spectrum cap, D&E urges the Commission to retain the cap in all but the largest urban markets and to reexamine the issue at its next biennial review, when a verdict on the level of meaningful competition may be more conclusive than is apparent from the comments submitted in this proceeding. From the perspective of the long-term future of the wireless marketplace, two years is a very short time to wait for a more certain assessment, especially in light of the dramatic and irreversible consequences of repealing the spectrum cap. In the meantime, parties wishing to acquire spectrum in excess of the cap already have a mechanism in place -- the Commission's waiver provisions -- by which to prove that such acquisitions would not be anti-competitive.

For the reasons discussed in D&E's comments and reply comments, the Commission should retain the CMRS spectrum cap in all but the largest urban markets, defined as the top 50 BTAs ranked by population.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I, Robert S. Childress, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that a copy of the foregoing "Reply Comments of D&E Communications, Inc." was served this 10th day of February 1999, first class mail, postage prepaid, upon the following:

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